A

TEH ENG PENG & ANOR

v.

TEH SWEE LIAN

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: C-02-564-1998]

C

11 OCTOBER 2005
(14 JULY 2004)

CONTRACT: *Brokerage contract - Commission - Sale of land - Claim by respondent for commission from sale of land - Whether respondent*

D

practising or carrying on business as an estate agent - Whether there existed an "estate agency relationship" between respondent and landowners - Whether actions taken by respondent in sale of land contrary to law - Valuers, Appraisers and Estate Agents Act 1981, ss. 22B, 22C

E

This was an appeal by the appellants against the decision of the learned High Court judge allowing in part the respondent's claim against the 1st and 2nd appellants. The 1st appellant and his two brothers, the 2nd appellant and one Teh Eng Choo, were co-owners of four pieces of land ('the said lands'). They decided to

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dispose of the said lands and drew up an agreement authorising the respondent – the son of Teh Eng Choo and, therefore, the nephew of the 1st and 2nd appellants – to find a buyer for the said lands. The respondent succeeded in obtaining a purchaser for the first three pieces of the said lands, and subsequently, brought

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a claim for his commission and an additional sum due to him under the agreement. The 1st appellant, relying on ss. 22B and 22C of the Valuers, Appraisers and Estate Agents Act 1981 ('the Act'), contended that since the respondent was not a registered real estate agent and thus not authorised under the Act to undertake

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estate agency practice, the actions and steps taken by the respondent in the sale of the said lands was contrary to the law. The respondent, however, argued that he was not practising or carrying on an estate agency practice and that what he did in the circumstances of this case fell outside the provisions of the Act.

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The learned High Court judge agreed with the respondent's submission resulting in the present appeal.

Held (dismissing the appeal)
Per Arifin Zakaria JCA:

[1] In the present case, as emphasized by the learned High Court judge, there was not in existence a system or a course of conduct that went to show that the respondent was practising or carrying on business as an estate agent. The transaction in question was just an isolated transaction. Further, there was no "estate agency relationship" existing between the respondent and the landowners, including the 1st appellant. What had happened was that the landowners requested the respondent to look for potential buyers of the said lands, and if he succeeded, he would be paid a commission. There was nothing to show that the respondent had offered any professional advice or other services to the 1st appellant as an estate agent. In addition, the respondent was a close relation of the 1st appellant and his father was one of the co-owners of the said lands. All these facts conjointly negatived the existence of an "estate agency relationship" between the parties. The respondent could not be said to be carrying on the practice of estate agency based on a single transaction, in the absence of some evidence of a system or continuity in his conduct or activity (*Matad Sdn Bhd v. Ng Chee Keong* foll). (pp 257 E - G & 258 C)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan yang arif hakim Mahkamah Tinggi kerana membenarkan sebahagian tuntutan responden terhadap perayu pertama dan kedua. Perayu pertama dan dua adik beradiknya, iaitu perayu kedua dan seorang Teh Eng Choo, adalah pemilik bersama empat bidang tanah ('tanah tersebut'). Mereka berhasrat untuk menjual tanah tersebut dan berikutnya membuat perjanjian membenarkan responden –anak kepada Teh Eng Choo, dengan dengan itu juga anak saudara kepada perayu-perayu pertama dan kedua – untuk mendapatkan pembeli bagi tanah tersebut. Responden berjaya mendapatkan pembeli bagi tiga dari empat bidang tanah tersebut, dan berikutnya membuat tuntutan untuk mendapatkan komisyen serta sejumlah lagi wang yang harus dibayar kepadanya di bawah kontrak. Perayu pertama, dengan bergantung kepada ss. 22B dan 22C Akta Penilai, Pentaksir dan Ejen-Ejen Harta-Tanah 1981 ('Akta'), berhujah bahawa oleh kerana responden bukanlah seorang ejen harta-tanah

dan dengan itu tidak boleh beramal sebagai ejensi harta-tanah di bawah Akta, maka segala tindak tanduk responden berhubung penjualan tanah tersebut adalah bertentangan dengan undang-undang. Responden bagaimanapun menghujah balas bahawa beliau tidak beramal atau menjalankan kegiatan sebagai ejensi harta-tanah, dan apa yang beliau lakukan dalam halkeadaan yang wujud adalah di luar skop Akta. Yang arif hakim bersetuju dengan hujah responden, sekaligus mengakibatkan rayuan di sini.

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria HMR:

[1] Dalam kes semasa, sepertimana yang ditekankan oleh yang arif hakim Mahkamah Tinggi, tidak wujud apa-apa sistem atau rentetan kelakuan yang memperlihatkan bahawa responden beramal atau menjalankan perniagaan sebagai ejen harta-tanah. Transaksi terbabit hanyalah suatu transaksi yang terpencil. Selain itu, tidak wujud 'hubungan ejen harta-tanah' antara responden dan pemilik-pemilik tanah, termasuk perayu pertama. Apa yang berlaku adalah pemilik-pemilik tanah meminta supaya responden mencari pembeli bagi tanah tersebut, dan jika berjaya, beliau akan dibayar komisyen. Tiada suatu pun yang menunjukkan bahawa responden telah menawarkan khidmat nasihat profesional atau apa-apa perkhidmatan lain sebagai ejen harta-tanah kepada perayu pertama. Tambahan, responden adalah saudara rapat perayu pertama dan bapanya adalah salah seorang dari pemilik tanah tersebut. Fakta-fakta ini, secara bersesama, menolak kewujudan sebarang "hubungan ejensi harta-tanah" di antara pihak-pihak. Responden tidak boleh dikatakan telah beramal sebagai seorang ejen harta-tanah cuma kerana suatu transaksi tunggal ini sementelah dengan tiadanya keterangan tentang kewujudan sebarang sistem atau kesinambungan kelakuan atau kegiatannya (*Matad Sdn Bhd v. Ng Chee Keong* diikuti).

Case(s) referred to:
Hindustan Steel Ltd v. The State of Orissa AIR [1970] SC 253 ***(refd)***
Luxor (Eastbourne) Ltd v. Cooper [1941] AC 108 ***(refd)***
Matad Sdn Bhd v. Ng Chee Keong [2004] 2 CLJ 99 CA ***(foll)***
Smith v. Anderson [1880] 15 Ch D 247 ***(refd)***
SRK Trading Sdn Bhd v. City One Sdn Bhd & Anor [1993] 4 CLJ 617 HC ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 11
Valuers, Appraisers and Estate Agents Act 1981, ss. 2, 22B, 22C(1)(c), (d)

For the appellants - Robert Lazar; M/s Shearn Delamore & Co
For the respondent - Mogan Mariappan; M/s Ho Mogan & Nor'aini

[Appeal from High Court, Temerloh; Suit No: 22-9-96]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria JCA:

Background
This is an appeal against the decision of the learned High Court Judge in allowing in part the respondent/plaintiff's claim against the 1st and 2nd appellants. The 2nd appellant had since passed away and his estate had discontinued the appeal, therefore, we are only left with the appeal of the 1st appellant. We dismissed the appeal and we now give our reasons.

Facts
The 1st appellant and his two brothers, Teh Seng @ Teh Eng Woon (2nd appellant) and Teh Eng Choo were co-owners of 4 pieces of land namely:

(i) CT No. 1760 : Lot 1128,

(ii) Grant No. 3536 : Lot 1149,

(iii) Grant No. 3538 : Lot 1148 and

(iv) Grant No. 3539 : Lot 1124,

all in Mukim Sabai, Daerah Bentong, Pahang ("the said lands"). The respondent is the son of Teh Eng Choo and is, therefore, the nephew of the 1st and 2nd appellants. The 1st appellant had 5/8 shares over the said lands, while the 2nd appellant and Teh Eng Choo had 1/8 and 2/8 shares respectively.

They decided to dispose of the said lands. Sometime in January 1995 they called the respondent to the 1st appellant's shop and requested the respondent to find buyer for the said lands. An agreement was then drawn up authorizing the respondent to sell the said lands. This agreement is produced as exh. P1 ("the agreement"). Under the agreement the sale price is stated as RM40,000 per acre and the respondent will be paid a commission of 2% from the total sale price. It is further provided that in the event the respondent is able to sell the said lands above RM40,000 per acre then the additional value shall belong to the respondent.

The respondent then passed the word round of the offer for sale of the said lands. Through his brother-in-law and someone named Leong, the respondent succeeded in obtaining a purchaser for the first three pieces of the said lands. This appeal is only concerned with the sale of these three pieces of the said lands. They were sold for a total sum of RM7,614,475 and the said sum was paid to the owners according to their respective shares. This claim by the respondent is for commission and the additional sum due to him under the agreement.

Issues And Findings

Both before us and in the court below the 1st appellant contended that the agreement P1 was illegal, null and void and consequently not enforceable in law. Reliance was placed on ss. 22B and 22C of the Valuers, Appraisers And Estate Agents Act 1981 ("the Act") and s. 11 of the Contracts Act 1950. The 1st appellant's contention was that as the respondent was not a registered real estate agent and not authorised under the Act to undertake estate agency practice, therefore, the actions and steps taken by the respondent in the sale of the said lands was contrary to law. It follows, therefore, that the agreement is not enforceable against the appellant.

The relevant provisions of ss. 22B and 22C of the Act state:

> 22B. Estate agency practice
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> (1) Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice.

22C (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16:

(a) practise or carry on business or take up employment under any name, style or title containing the words "Estate Agent". "House Agent'', "Property Agent". "Land Agent", "House Broker" or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent.

(aa) carry on business or take up employment as an estate agent;

(b) ...

(c) undertake any of the work specified in section 22B; or

(d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

It is not in dispute that the respondent in the present case was not a registered estate agent under the Act, therefore, the 1st appellant contended the respondent is not allowed under s. 22C(1)(c) from undertaking any work specified in s. 22B. And by s. 22C(1)(d) he is precluded from claiming against the 1st appellant for any fees, charges or remuneration. On that premise, the 1st appellant contended, the claim by the repondent must fail.

In reply the learned counsel for the respondent argued that the respondent in this case is not practising or carrying on an estate agency practice. What he did was to look for buyer for the said lands at the request of the owners. Further he contended the respondent never held himself out to the members of public that he is an estate agent or carrying out estate agency practice. Therefore, he said, what the respondent did in the circumstances of this case falls outside the provisions of the Act.

The learned judge agreed with the respondent's submission. In his grounds of judgment which was in Bahasa Malaysia, he summarised the issues and his findings thereon are as follows:

A Satu-satunya persoalan yang timbul dan perlu diputuskan oleh Mahkamah ini ialah samada P1 adalah merupakan satu kontrak yang menyalahi undang-undang yang menyebabkan ianya tidak boleh berkuatkuasa.

B Di dalam mencari jawapan kepada persoalan ini perlulah juga diputuskan sama ada defendan di dalam tindakannya mendapatkan pembeli bagi tanah-tanah tersebut telah bertindak sebagai "estate agent".

C Akta 1981 tidak ada membuat pengtakrifan bagi ungkapan "estate agent". Walau bagaimanapun *The Concise Oxford Dictionary* (Ninth Edition) memberi erti "estate agent" sebagai "a person whose business is the sale or lease of buildings and land on behalf of others". Sementara perkataan "business" pula diberi erti sebagai "one's regular occupation, profession or trade.

D Di bawah seksyen 22B seseorang hanya boleh menjalankan "estate agency practice" setelah ia mendaftar sebagai "estate agent" dan diberi kebenaran untuk beramal sedemikian. Ungkapan "estate agency practice" telah ditakrifkan di bawah seksyen 2 sebagai "acting or holding oneself out to the public as ready to act, for reward, as an agent in respect of the sale or other disposal of E lands and buildings ...". Dari ungkapan di atas perkataan yang operatif dan perlu diberi penekanan ialah "practice". *The Concise Oxford Dictionary* telah memberi erti "practice" di antara lain ialah "habitual action or performance, repeated exercise in an activity requiring the development of skill."

F *Kamus Dewan Inggeris/Melayu, Dewan Bahasa dan Pustaka* (Edisi Pertama) memberi makna "practice" di antara lain sebagai "habitual action, kebiasaan, amalan, business establishment.

G Berpandukan kepada erti dan maksud yang diberikan seperti yang dinyatakan di atas maka amatlah jelas bahawa seseorang itu akan hanya boleh dianggap dan dikira sebagai melakukan dan menjalankan "estate agency practice" sekiranya ia menjalankan amalan dan perniagaan seperti yang dilakukan oleh seseorang estate agent.

H We are in full agreement with the reasoning and the conclusion arrived at by the learned judge. From the long title it is clear that the Act seeks to provide, *inter alia*, for the registration of estate agents and for matters connected therewith. By s. 2 of the Act "estate agency practice" is defined as follows:

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> "estate agency practice" means acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein;

Taking into consideration the definition as set out above, could the respondent in the present case be considered to have carried out "estate agency practice". This is a question that may be answered by looking at the surrounding circumstances relating to the sale transaction of the said lands itself and any similar transaction that the respondent may have been involved. The learned judge had correctly addressed his mind to this issue. He took into consideration the close relationship between the respondent and the owners, who are his father and uncles. He also found that there was no evidence to show that the respondent had held himself out as carrying on estate agency practice or had carried out similar transactions on previous occasions. He described the transaction in question as an isolated transaction. In the circumstances, the learned judge concluded that what had taken place here is not caught by ss. 22B and 22C of the Act and, therefore, the agreement is valid and enforceable in law.

His decision found support in the decision of this court in *Matad Sdn. Bhd. v. Ng Chee Keong* [2004] 2 CLJ 99. In that case the defendant, who was interested in buying some land, promised to pay the plaintiff 1% for introducing the land. The plaintiff introduced the defendant to a vendor with land for sale. The defendant bought the land but refused to pay the plaintiff his commission. The plaintiff commenced action to recover the commission as promised. The defendant took two main defences, namely: (i) that it was not the plaintiff who introduced the land; and (ii) that the contract which the plaintiff sought to enforce was illegal and void in that it contravenes the Act. The High Court found for the plaintiff on both issues. What concerned us is the second defence raised in that case, that is, the legal defence. The appeal by the defendant in that case was dismissed by the Court of Appeal. After a thorough analysis of the relevant provisions of the Act, Gopal Sri Ram JCA, in delivering judgment of the court, observed as follows:

> What we need to say for the present is that the word "acting" in the definition clause must be read contextually, that is to say, in the context of s. 22C. That section comtemplates someone who "practises as" or who may "carry on business" as "an estate agent". (See s. 22C(1a) and (aa)). Special notice should also be taken of the use of the word "practise" in the opening words of s. 22C(1).
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> Two points need to be made immediately. First, the section uses language that requires some system. Words such as "practice", "carry on business" point to a course of conduct: not to an isolated act. It is not unlike the Moneylenders Act cases. There too, a course of conduct or system is called for: see, *Yeep Mooi v. Chit Chin Chua & Ors.* [1981] 1 MLJ 14, *Shamsudin v. Vijeyacone* [1971] 1 MLJ 7. It follows that the High Court did not fall into error by seeking assistance from those cases. Secondly, the section uses the term "estate agent". It is thus clear that the Act requires an estate agency relationship to exist between parties. In the absence of such a relationship the Act has no application. Whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case.

In the present case as emphasised by the learned judge, there was not in existence a system or a course of conduct which go to show that the respondent was practising or carrying on business as an estate agent. The transaction in question was just an isolated transaction. Further we found that there no "estate agency relationship" existing between the respondent and the land owners, including the 1st appellant. What happened was that the land owners requested the respondent to look for potential buyers of the said lands and if successful the respondent will be paid a commission. There was nothing to show that the respondent had offered any professional advice or other services to the 1st appellant as an estate agent. Further the respondent here was a close relation of the 1st appellant and as stated earlier his father was one of the co-owners of the said lands. In our judgment all these facts conjointly negative the existence of "estate agency relationship" between the parties.

Further it is to be noted that the decision of the High Court in the present case was considered by this court in *Matad Sdn. Bhd. (supra)* and it had met with the approval of the court. The court expressed the view that the learned judge had correctly held on the facts before him, that an isolated transaction did not constitute

a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice. The court, however, went on to say that what appears to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court. We entirely agree with that proposition. Further as rightly observed by Anuar J (as he then was) in *S.R.K. Trading Sdn.Bhd. v. City One Sdn Bhd. & Anor.* [1993] 4 CLJ 617, "The word 'practice' which appears in the Act, in my judgment, requires some continuous activity (See *Smith v. Anderson* [1880] 15 Ch D 247; *Hindustan Steel Ltd. v. The State of Orissa* AIR [1970] SC 253 and *Luxor (Eastbourne) Ltd. v. Cooper* [1941] AC 108)." Similarly here, we are of the opinion that, the respondent could not be said to be carrying on the practice of estate agency based on the single transaction, in the absence of some evidence of a system or continuity in his conduct or activity.

Decision

For the above reasons we dismissed the appeal herein with costs and directed that the deposit be paid to the respondent towards account of taxed costs.